Hyundai Rotem USA Corp. and Aerotek, Inc., Joint Employers *and* Transport Workers Union of Philadelphia, Local 234, AFL–CIO. Case 04–CA–037657

June 14, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND BLOCK

On September 9, 2011, Administrative Law Judge John T. Clark issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief. Respondent Aerotek filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[1]

There are no exceptions to the judge's unfair labor practice findings, including his finding that a confidentiality provision contained in Aerotek's required employment agreement violated Section 8(a)(1) of the Act. There are also no exceptions to the judge's Order remedying this undisputed violation by requiring Aerotek to mail the notice marked "Appendix B" to all of its current and former employees in the southeastern Pennsylvania area. However, the Acting General Counsel excepts to the judge's failure to order Respondent Aerotek to mail the same notice to its employees outside the southeastern Pennsylvania area who were required to sign and abide by the unlawful confidentiality provision.

Aerotek stipulated at the hearing that the employment agreement containing the unlawful provision was used in the southeastern Pennsylvania area. It now argues that the record does not show that any of its employees outside that area were subject to it, although it does not affirmatively contend that the unlawful provision was *not* in effect in other Aerotek regions. A copy of that agreement, entered into the record as General Counsel's Exhibit 2, suggests that it is a boilerplate document intended for general use by Aerotek for employees hired to work for clients, and is not limited to those hired in the southeastern Pennsylvania area.[2]

In similar circumstances, the Board has made provision for assuring that all employees subject to an unlawful requirement receive the Board notice by leaving to the compliance stage of proceedings the determination of whether there are affected employees outside the locations giving rise to a particular complaint who should receive a remedial Board notice. See *D & W Food Centers, Inc.*, 305 NLRB 553, 553 fn. 2 (1991) (leaving locations of notice posting to compliance given insufficient evidence of which stores received the employee handbook with an unlawful clause); cf. *NLS Group*, 352 NLRB 744, 746–747 (2008), incorporated by reference, 355 NLRB 1154 (2001), enfd. 645 F.3d 475 (1st Cir. 2011) (ordering notice mailed to all employees "under its temporary employment agreement (including but not necessarily limited to its right-of-way agents)" where employer stipulated only that right-of-way agents worked under agreement with unlawful provision). We shall therefore modify the judge's Order to provide essentially the same remedy here.[3]

ORDER

The National Labor Relations Board orders that the Respondents, Hyundai Rotem USA Corporation and Aerotek, Inc., joint employers, Philadelphia, Pennsylvania, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing an employment agreement provision under the heading "Confidentiality" that contains the following language: "YOU FURTHER AGREE NOT TO DISCUSS THE COMPENSATION STATED IN THIS AGREEMENT, OR THE COMPENSATION PAID TO YOU BY AEROTEK PURSUANT TO ANY PRIOR EMPLOYMENT AGREEMENT, IN ANY MANNER, WITH THE

[1] We shall modify the judge's recommended Order to correct inadvertent references to Region 3 instead of Region 4, and as further explained below.

[2] Additionally, Aerotek representatives testified at the hearing that the purpose of the confidentiality provision was to protect trade secrets and that wage rates are considered trade secrets because of the competitive nature of the staffing business. The record does not suggest that this company concern was limited to the southeastern Pennsylvania area.

Member Hayes does not join in the foregoing observation, which he finds inapposite to the issue whether the Respondent in fact required employees outside the southeastern Pennsylvania area to sign written employment agreements containing the unlawful confidentiality provision. Copies of such agreements, not a common business concern, will be the necessary proof on this issue.

[3] Aerotek nevertheless contends that an expansion of the notice-mailing requirement would be "punitive" because it would require Aerotek to review personnel files in offices across the country to determine which of its employees are or were subject to the unlawful confidentiality provision. We reject this contention. The expanded notice-mailing requirement itself is not punitive as long as it serves the remedial purpose of informing affected employees that they are no longer subject to the unlawful confidentiality provision. Further, to the extent that Aerotek contends that compliance with this requirement would be unduly burdensome, it has yet to provide specific evidence in support of this contention, despite being on notice, at least since the beginning of the hearing, that the Acting General Counsel was seeking nationwide notice mailing.

CLIENT, THE CLIENT'S EMPLOYEES OR ANY CONTRACT EMPLOYEE OF THE CLIENT."

(b) Promulgating, maintaining, or enforcing an oral rule prohibiting employees from discussing wages, hours, benefits, and other terms and conditions of employment among themselves, with other employees or with nonemployees.

(c) Using the overbroad confidentiality provision described above to threaten employees with discharge or discipline if they discuss wages, hours, benefits, and other terms and conditions of employment among themselves, with other employees or with nonemployees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the Board's Order, revise or rescind the unlawful employment agreement "Confidentiality" provision and notify the employees at both of the Respondents' Philadelphia locations, in writing, what action has been taken.

(b) Within 14 days after service by the Region, post at both Philadelphia, Pennsylvania facilities copies of the attached notice marked "Appendix A."[4] Copies of the notice, on forms provided by the Regional Director for Region 4 after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since February 25, 2010.

(c) Within 14 days after service by the Region, Respondent Aerotek shall duplicate and mail, at its own expense, copies of the attached notice marked "Appendix B."[5] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by Aerotek's authorized representative, shall be mailed to the last known address of all current and former employees of Aerotek, since February 25, 2010, who were required to sign an employment agreement containing the unlawful "Confidentiality" provision. Aerotek shall also notify those other current and former employees in writing what action has been taken regarding the unlawful "Confidentiality" provision. These mailing and notification requirements may be accomplished via email, rather than regular mail, to the extent Aerotek customarily communicates with employees by that method. Cf. *J. Picini Flooring*, 356 NLRB 11 (2010).[6]

(e) Within 21 days after service by the Region, each Respondent shall file with the Regional Director a sworn certification of responsible officials on a form provided by the Region attesting to the steps that it has taken to comply.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce the provision in our employment agreement under the heading, "Confidentiality" that contains the following language: "YOU FURTHER AGREE NOT TO DISCUSS THE COMPENSATION STATED IN THIS AGREEMENT, OR THE COMPENSATION PAID TO YOU BY AEROTEK PURSUANT TO ANY PRIOR EMPLOYMENT AGREEMENT, IN ANY MANNER, WITH THE CLIENT, THE CLIENT'S EMPLOYEES

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[5] See fn. 4, supra.

[6] For the reasons set forth in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of either Appendix A or B.

OR ANY CONTRACT EMPLOYEE OF THE CLIENT."

WE WILL NOT promulgate, maintain, or enforce an oral rule prohibiting you from discussing wages, hours, benefits, and other terms and conditions of employment among yourselves, with other employees or with nonemployees.

WE WILL NOT threaten you with discipline and discharge if you discuss your wages, hours, benefits, and other terms and conditions of employment among yourselves, with other employees, or with nonemployees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify you in writing as to whether we have revised or rescinded the overbroad confidentiality provision contained in our employment agreement.

HYUNDAI ROTEM USA CORPORATION AND AEROTEK, INC. (JOINT EMPLOYERS)

APPENDIX B

NOTICE TO EMPLOYEES
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WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

AEROTEK, INC.

Barbara C. Joseph, Esq., for the General Counsel.
Arlene J. Angelo, Esq. (Ballard Spahr LLP), of Philadelphia, Pennsylvania, for Respondent, Hyundai Rotem USA Corporation.
Marvin Weinberg, Esq. (Fox Rothschild LLP), of Philadelphia, Pennsylvania, for Respondent, Aerotek, Inc.
Claiborne S. Newlin, Esq. (Meranze, Katz, Gaudioso, & Newlin, PC), of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. On August 26, 2010,[1] Transport Workers Union of Philadelphia, Local 234, AFL–CIO (the Union or Charging Party), filed a representation petition in Case 04–RC–021737 seeking to represent certain of Respondent Hyundai Rotem USA Corporation (HRUSA) and Respondent Aerotek, Inc., employees as a joint employer (Respondents). At the same time the Union filed an unfair labor practice charge in Case 04–CA–037657 alleging that the Respondents violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discharging employee Donald Kleinback on August 25 because of his union activities.

On September 7, the Respondents, as joint employers, signed a stipulated election agreement setting an election date of October 1 for employees employed at the Respondents' facilities located at 4500 Germantown Avenue and 2400 Weccacoe Avenue in Philadelphia, Pennsylvania.

On September 9, employee Joseph Flynn filed a charge in Case 04–CA–037677 alleging that the Respondents violated Section 8(a)(3) and (1) of the Act by discharging him on July 19 because of his union activities.

The Union lost the election and on October 8 filed objections to conduct affecting the results of the election.

On October 15, the Union amended the charge in Case 04–CA–037657 to also allege that the Respondents had restrained and coerced employees in the exercise of their Section 7 rights and had maintained an illegal rule subjecting employees to discipline for discussing their compensation and benefits with other employees in violation of Section 8(a)(1) of the Act.

On November 30, Flynn amended his charge in Case 04–CA–037677 to allege that the Respondents terminated him not only because of his union activities, but also because he concertedly complained about unsafe working conditions.

The Union filed a charge on November 30, in Case 04–CA–037838 alleging that the Respondents violated Section 8(a)(1) of the Act by engaging in unlawful interrogations, surveillance, an assault, and issued Kleinback a written discipline because of his union activity in violation of Section 8(a)(3) of the Act.

An order consolidating cases, consolidated complaint, and notice of hearing in Cases 04–CA–037657, 04–CA–037677,

[1] All dates are in 2010, unless otherwise indicated.

and 04–CA–037838, issued on December 29 setting forth the allegations contained in the foregoing charges.

On January 4, 2011, a notice of hearing on objections to the election in Case 04–RC–021737 issued. Also on that date the Regional Director for Region 4 of the National Labor Relations Board (the Board), issued an order consolidating Cases 04–CA–037657, 04–CA–037677, and 04–CA–037838, with Case 04–RC–021737 for hearing and ruling and decision by an administrative law judge of the Board.

The Respondents filed a timely answer to the consolidated complaint along with affirmative and other defenses on January 11, 2011. The Respondents admit the service of the charges, the jurisdictional facts for each Respondent, the job titles for most of the individuals alleged to be supervisors/agents, the facts establishing their joint employer status, the legal conclusion that they are joint employers, and the labor organization status of the Union. The Respondents denied the substantive allegations of the complaint and affirmatively defend that they had legitimate and substantial business justifications for discharging Kleinback and Flynn.

On February 9, 2011, the Regional Director issued an order severing cases because a bilateral informal settlement agreement was reached by the parties in Cases 04–CA–037677, 04–CA–037838, and portions of Case 04–CA–037657, and the Union requested withdrawal of its objections in Case 04–RC–021737. Thus, Case 04–RC–021737 and paragraphs 6–12 and related portions of paragraphs 13 and 14 were severed from the consolidated complaint, leaving only the substantive allegations contained in paragraphs 5(a) and (b) of the consolidated complaint for hearing.

I heard the remaining allegations on February 10, 2011, in Philadelphia, Pennsylvania. Those allegations concern the maintenance and enforcement, by the Respondents, of a portion of the confidentiality provision contained in the employees' employment agreement that prohibits them from discussing their compensation "in any manner, with the client, the client's employees or any contract employees of the client."

On the entire record, including my credibility determinations based on the demeanor of the witnesses, as well as my credibility determinations based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and inferences drawn from the record as a whole and, after considering the briefs filed by the Respondents, the Charging Party and the counsel for the Acting General Counsel,[2] I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, HRUSA, a Pennsylvania a corporation, with a facility at 2400 Weccacoe Avenue, Philadelphia, Pennsylvania (the Factory), has been engaged in the assembly of rail cars. HRUSA, in conducting its business operations at the Factory, annually purchased and received goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. HRUSA admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, Aerotek, a Maryland corporation working at the Factory, has been engaged in providing temporary work force staffing to other businesses including HRUSA. Aerotek, in conducting its business operations at the Factory received in excess of $50,000 from HRUSA for providing work force staffing services. Aerotek admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondents admit and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Since at least February 2010, Aerotek has been providing personnel to perform work for HRUSA at its Philadelphia facility located at 2400 Weccacoe Avenue (the Factory). These employees are provided pursuant to an agreement between HRUSA and Aerotek. HRUSA and Aerotek admit that they exercise control over the labor relations policies with respect to the employees who are supplied to, and work for, HRUSA, but are paid by Aerotek. Furthermore they admit that they codetermine the terms and conditions of employment of those as joint employers.

The appropriate collective-bargaining unit as described in the parties stipulated election agreement is:

> All full time and regular part time production employees, maintenance employees, warehouse employees, quality control and testing employees jointly employed by [the Respondents] at the facilities located at 4500 Germantown Avenue and 2400Weccacoe Avenue, Philadelphia, Pennsylvania. [GC Exh. 1(d).]

It is not disputed that all employees of the Respondents, who are hired through Aerotek, must complete, date, and sign a three-page "Employment Agreement." (GC Exh. 2.) After the agreement is completed it is signed by the applicant and a Aerotek representative.

Section 1 of the agreement, "Ratification," states in relevant part: You understand and acknowledge that this offer of temporary employment with AEROTEK, is subject to final approval by the Client and that you shall not be entitled to any wages or employment unless actually hired by Aerotek to work the specific assignment for the Client pursuant to this agreement.

Section 3 of the agreement, "Compensation," sets forth hourly and overtime rates, bonus eligibility, holiday pay, accrual of paid personal time and accrual of paid vacation time. Section 5, "Confidentiality" ends with the following: YOU FURTHER AGREE NOT TO DISCUSS THE COMPENSATION STATED IN THIS AGREEMENT, OR THE COMPENSATION PAID TO YOU BY AEROTEK PURSUANT TO ANY PRIOR EMPLOYMENT AGREEMENT, IN ANY MANNER, WITH THE CLIENT, THE CLIENT'S EMPLOYEES OR ANY CONTRACT EMPLOYEE OF THE CLIENT.

[2] The counsel for the Acting General Counsel's unopposed motion to correct the transcript is granted, except replace the first "a" on p. 11, L. 2 with "the." Also on p. 11, L. 12 replace "enforces" with "enforced this." I do not see a need for a correction on p. 75, L. 9.

During the summer of 2010, the Union conducted an organizing campaign at the Weccacoe Avenue facility. The Union talked to employees and distributed literature to them outside of the facility. The Union filed an RC petition to represent the mechanical and electrical final assembly rail cars employees working on HRUSA rail cars through TTA, another contract employer at the Weccacoe Avenue facility. The petition was amended on June 28 to add HRUSA as a joint employer, with TTA, of those employees. On August 5, the Union won the election in the Hyundai and TTA joint employer unit and was certified to represent the employees on August 16.

B. Aerotek Supervisor Philip Lee has Employee Visitors

Supervisor Philip Lee is Aerotek's account recruiting manager and an admitted supervisor of the Respondents within the meaning of Section 2(11) of the Act. His office is in the Weccacoe Avenue facility. Donald Kleinback was a welder at the Weccacoe Avenue facility. On June 24, shortly after the Union filed the petition to represent the TTA employees, Kleinback went to Lee's office to get a free T-shirt. When he entered the office fellow employees welders Paul Fisher and Matt Padro were talking with Lee. Kleinback testified that he did not hear the conversation, but was later told by the employees that they were talking to Lee about pay.

Lee's best recollection is that Fisher, Kleinback, and another employee came to his office to get T-shirts. After getting the T-shirts one of the men closed the door and Fisher began talking about the upcoming TTA election. Fisher said, "[W]ith the things that are going on with TTA right now, we're going to want a pay increase. If that doesn't happen, I don't know what's going to happen." Lee did not respond and the men left.

C. Lee Reacts

Paragraph 5(b) of the complaint alleges that on or about June 24, 2010, the Respondents, by Phil Lee, enforced the confidentiality provision set forth above by telling employees that they were not to discuss their pay with each other. In support of this allegation Kleinback testified that also June 24, at approximately 2 p.m. he and about 10 other welders were going outside for their break. As they were leaving, Lee told them to gather around him. Kleinback testified that Lee appeared to be upset. Lee told the employees that he did not want them talking to each other about their wages. Lee also said, accordingly to Kleinback, that he did not want them talking to TTA employees about the wages the welders were paid. Lee concluded by telling the welders that he did not want them bringing wages up and trying to leverage him for more money, that they had signed a contract and that was the wage that they would be getting.

Lee denied ever telling employees not to discuss wages. Counsel for the Acting General Counsel argues that Lee is not creditable and that his statements violated Section 8(a)(1) of the Act.

On August 24, 2010, Kleinback was discharged for an unrelated reason. He filed an unfair labor practice charge with the Board, and his charge was resolved by a non-Board settlement agreement. With those events in mind I closely observed and listened to Kleinback's testimony in order to ascertain if he had a bias against the Respondents. I neither heard nor observed any bias on Kleinback's part. On the contrary he appeared to be a fully credible witness who exhibited excellent recall and testified in a candid and convincing manner. His testimony was even more impressive because much of it related to a matter that was developed on cross-examination.

In contrast to Lee, Kleinback clearly and without reservation identified Matthew Padro and Paul Fisher as the welders who were in Lee's office when he arrived. He denied going to Lee's office with Fisher and Padro and he twice emphatically denied being part of the conversation with Lee. He testified that he overheard nothing of what was said and that all his knowledge about what was said, was told to him by Fisher.

Lee identified the employees who were in his office as "Paul Fisher, to my best recollection, I thought it was Paul Fritz, another welder and Don Kleinback." (Tr. 59.) During cross-examination, when asked to identify who was with Fisher he states, "I believe Paul Fritz and Donald Kleinback." (Tr. 64.) When asked if all three were present during the conversation he answers "[t]o my recollection, yes." Later he claims, "[f]rom what I remember all three were there" the entire time. (Tr. 64.) When asked if he is sure he admits that he is not a "[h]undred percent sure, I guess I'm not sure." (Tr. 65.)

Lee's lack of certainty is troubling. He claims that the employees made him feel "like I was cornered in my small office." (Tr. 68.) And consequently he sent an email to all Aerotek employees because he "felt, you know, threatened to get—you know, to give them that increase. If—you know, if I didn't, I don't know, because he (Fisher) just left it at I don't know what's going to happen." (Tr. 71.) Immediately after this statement he agrees with the counsel for the Charging Party that he was not physically threatened. Counsel then asked if Lee felt threatened because the men might unionize. Lee responds "possibly," but then immediately contradicts himself by stating, "I felt threatened because I had three grown men in my small office close the door . . . and then say 'we need a pay increase or I don't know what's going to happen.' I don't know what to take from that." (Tr. 72.) Lee previously averred that Fisher was the speaker for the group and that the other men "didn't say anything that—to help me out or say otherwise."

I do not find Lee to be a credible witness. Surely Fisher's statement that if the employees did not get a pay increase he did not know what would happen, cannot in anyway be construed as a threat of physical violence. Indeed, the Board has found, with court approval, that stronger statements were nonthreatening and protected by the Act. *Kiewit Power Constructors Co.*, 355 NLRB 708, 710–711 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011) (Physical threat must be unambiguous). In fact when the statement is considered in the context of the pending TTA union representation election it may fairly be assumed that Fisher was implying that a union representation election might be in the offing.

I also find it incredible that Lee feels cornered in his small office, with the door closed, by three of his employees and yet he cannot say with absolute certainty that one of his employees was present the entire time.

I find it suspicious that Kleinback was not subject to a vigorous examination as to how he could be present in a small en-

closed office with three other men, only one of whom spoke, and yet claim that he did not hear a word that was said.

I find it incomprehensible that Lee told no one of his ordeal, nor did he discipline any of his alleged tormentors. He claims that he felt that "it" could be handled by sending an email to all Aerotek employees. (GC Exh. 3.)

Shortly after ordering the welders not to discuss their wages, he sent an email to the 50 or 60 Aerotek employees who work at the facility. In addition to reminding them that they all signed the employment agreement (GC Exh. 2), he attached a copy of the agreement to the email, and reproduced verbatim, the following part of the confidentiality section: YOU FURTHER AGREE NOT TO DISCUSS THE COMPENSATION STATED IN THIS AGREEMENT, OR THE COMPENSATION PAID TO YOU BY AEROTEK PURSUANT TO ANY PRIOR EMPLOYMENT AGREEMENT, IN ANY MANNER, WITH THE CLIENT, THE CLIENT'S EMPLOYEES OR ANY CONTRACT EMPLOYEE OF THE CLIENT.

As a "furthermore" he quotes from the ratification section of the agreement which states, "that Aerotek may terminate your employment, with or without cause, at any time." He then warns the employees that, "if I am threatened again or leveraged with inquiries of pay increases by recent events with TTA, I will resort to applying the ramifications of this agreement." (GC Exh. 3.)

The counsel for the Acting General Counsel contends that the Respondents through Lee, it's supervisor, violated Section 8(a)(1) by informing its employees they could be terminated for discussing their wages and benefits "in any manner, with the client, the client's employees or any contract employees of the client.

D. Discussion

"[W]age discussions among employees are considered to be at the core of Section 7 rights." *Parexel International, LLC,* 356 NLRB 516, 518 (2011). "An employer's rule which prohibits employees from discussing their compensation is unlawful on its face." *Danite Sign Co.*, 356 NLRB 975, 975 fn. 1 and 981 (2011) quoting *Freund Baking Co.*, 336 NLRB 847 (2001); *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 646 (2004).

Based on the foregoing I find that the Respondents have violated Section 8(a)(1) of the Act by promulgating a policy that explicitly prohibits employees from discussing their compensation. Thus, under its confidentiality policy, which is part of its employment agreement, Aerotek asserts that it may discharge any employees who discuss any facet of their compensation with an employee of the client. At the Weccacoe Avenue location, which is the subject of the charge, HRUSA and Aerotek are admitted joint employers. Because they are all employees of Aerotek as well as employees of the client HRUSA, they are forbidden to discuss their compensation with each other. The provision also prohibits discussing their compensation with contract employees of the client, such as TTA.

Michael Burke, Aerotek's director of business operations testified that it was his understanding that TTA was not a staffing company and "we define contract people, is that they are working through a staffing company." He never identified the "we," but based on the credited testimony and Lee's email it is obvious that Lee did not want the employees talking to the TTA employees. Moreover Burke's understanding appears to be inconsistent with footnote 2 of Aerotek's brief:

> Aerotek has always interpreted '"contract employees hired by Aerotek's clients"' to exclude other Aerotek employees, but include individuals hired by their clients to perform certain tasks. For instance, Mr. Kleinback was free to discuss his wages with other Aerotek employees (or any union), but was not to discuss his wages with employees hired by [TTA], a company providing [HRUSA] with certain contract employees. [Emphasis in the original.]

The footnote contains no citations to the record and there is no evidence that any employee was ever told of Aerotek's "interpretation" or Burke's "understanding." *Laidlaw Transit, Inc.*, 315 NLRB 79, 83 (1994).

Based on the foregoing I find that the Respondents confidentiality provision contained in their employment agreement explicitly restricts Section 7 activity and would likely have a chilling effect on Section 7 rights such that the mere maintenance of the provision is an unfair labor practice, even absent evidence of enforcement. See, e.g., *NLRB v. Vanguard Tours,* 981 F.2d 62, 67 (2d Cir. 1992) (citing *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 803 fn. 10 (1945)).

1. Counsel for the Acting General Counsel's additional argument

Counsel for the Acting General Counsel also submits that even if the provision did not explicitly restrict Section 7 rights the provision is nonetheless unlawful "because the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004).

Thus, Lee's June 24 email set forth the overbroad confidentiality provision verbatim. That provision prohibits the employees from discussing their current compensation, and all prior compensation, earned pursuant to the Aerotek employment agreement, in any manner, with the client, the client's employees or any contract employee of the client.

The paragraph following the overbroad confidentiality provision is a single sentence. That sentence instructs the employees to "look under section 1" of the employment agreement where it is written that Aerotek may terminate the employees "with, or without cause, at any time."

In the final paragraph Lee warns the employees that if he is "threatened again or leveraged with inquires of pay increases by recent events with TTA, I will resort to applying the ramifications of [the employment] agreement."

Certainly the veiled reference to "recent events with TTA" is not lost on the employees. It cannot be anything other than the Union soliciting the employees directly outside of the facility, and the filing of an election petition with the Board to represent the TTA employees.

"The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Double D Construction Group,* 339 NLRB 303, 303–304 (2003) (footnote

omitted). I find that Lee's email, which was sent to all employees at the facility who signed the Aerotek employment agreement, satisfies the Board's test.

Counsel for the Acting General Counsel also argues that the statements made by Lee just before sending his email are evidence that those employees who heard his statements would reasonably construe the language of the confidentiality provision as a prohibition of the employees' Section 7 rights. Lee's statements were absolute and made without reservation. He told the 10 welders in no uncertain terms that they were not to speak about their wages among themselves, with any TTA employee, and to not even mention wages to Lee in an effort to leverage him for more money. In short Lee's actions on June 24 constituted a blanket prohibition of the employees' Section 7 rights to discuss wages and compensation, followed by a direct threat of discharge if the employees questioned or leveraged Lee with inquires about pay, all of which was predicated on the Respondents' overly broad confidentiality provision.

2. The Respondents' defenses

The Respondents argue that Aerotek's confidentiality provision is premised on legitimate and substantial business justifications. In support of this argument Burke testified that Aerotek is in a very competitive business and if competitors learn of the employees' wage rates they could undercut Aerotek and be awarded the bid. The second reason offered by Burke was to prevent the client from learning of Aerotek's margin, i.e., the monetary difference between what Aerotek charged the client and what it paid its employees. The final reason is to prevent the client's employees from learning that they were making less money than Aerotek employees, this would cause problems for the client and Aerotek would not be awarded repeat business or would have its contract canceled by the client.

These reasons are similar to those offered by another supplier of temporary workers in *NLS Group*, 352 NLRB 744 (2008), incorporated by reference in 355 NLRB 1154 (2010), enfd. 645 F.3d 475 (1st Cir. 2011). There the administrative law judge found that although the Respondent's confidentiality provision did restrict the employees' Section 7 right to discuss their terms and conditions of employment with third party clients, the Respondent's proffered business justifications outweighed the restriction on those rights. The Board had two opportunities to adopt the judge's decision and yet both times it found that the confidentiality provision was unlawful because the employees reasonably would construe it to prohibit activity protected by Section 7.

I find that the Respondents proffered business justifications do not outweigh the employees' right to discuss their wages. A right referred to as "the core of Section 7 rights," "the most critical element in employment," and "the grist on which concerted activity feeds." *Parexel International, LLC*, 356 NLRB at 518, (2011), and cited cases.

The Respondents also argue that the confidentiality provision is not overly broad because it contains no "blanket" limitation on discussing wages with "other parties'" (which could be construed by employees to include a union) or with co-workers. The Respondents cite *NLS Group*, above, as support. (R. Br. at 12.)

The Board, in *NLS Group*, after applying the general standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), concludes "that the Respondent's confidentiality provision is unlawful because employees reasonably would construe it to prohibit activity protected by Section 7." (Footnote omitted.) "The provision, by its clear terms, precludes employees from discussing compensation and other terms of employment with 'other parties.' Employees would reasonably understand that language as prohibiting discussions of their compensation with union representatives." (Supra at 745.)

I have previously found that the confidentiality provision, both as written and as enforced by Lee, prohibits the Respondents' employees from discussing compensation among themselves, HUSA employees, and TTA employees, all of whom are literally coworkers. Counsel for the Acting General Counsel also provides a plethora of case support for the contention that the Board has found employee communications about wages and working conditions to be protected concerted activities under Section 7 when directed to numerous other entities apart from coworkers and unions. (GC Br. at 14.) Suffice it to say, as did the United States Court of Appeals for the First Circuit, that "since its 1990 decision in *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990), the Board has consistently held that when a rule's plain language restricts employees' ability to communicate their conditions of employment to third parties it violates section 8(a)(1)." (Citation omitted.) *NLRB v. Northeastern Land Services Ltd.*, 645 F.3d 475, 483 fn. 4 (1st Cir. 2011), enfg. 352 NLRB 744 (2008).

Based on the foregoing and the record as a whole I find that the Respondents violated Section 8(a)(1) of the Act by maintaining a provision in the confidentiality section of their employment agreement explicitly prohibiting employees from discussing their wages and benefits "in any manner, with the client, the client's employees or any contract employee of the client." I further find that the Respondents violated Section 8(a)(1) when, on June 24, 2010, Phillip Lee, its supervisor, explicitly restricted the employees' Section 7 rights by orally ordering them not to discuss their wages among themselves or with any TTA employees. I also find that Lee violated Section 8(a)(1) when, on June 24, he sent an email to all Respondents' employees at the facility. In his email Lee warned the employees that they could be terminated for discussing their wages and benefits "in any manner, with the client, the client's employees or any contract employee of the client." Attached to his email is a copy of the employment agreement and the overbroad confidentiality provision is quoted verbatim in the email. Accordingly, I find that the overbroad confidentiality provision "has been applied to restrict the exercise of Section 7 rights," which, in addition to the provision being an explicit restriction on those rights, is another reason that overbroad confidentiality provision is unlawful. *Lutheran Heritage*, above at 647.

CONCLUSIONS OF LAW

1. The Respondents Hyundai Rotem USA Corporation and Aerotek, Inc., are joint employers within the meaning of the Act and have been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Transport Workers Union of Philadelphia, Local 234, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondents have violated Section 8(a)(1) of the Act by the following conduct.

(a) Maintaining or enforcing a provision in its employment agreement under the heading, "Confidentiality" that contains the following language: "YOU FURTHER AGREE NOT TO DISCUSS THE COMPENSATION STATED IN THIS AGREEMENT, OR THE COMPENSATION PAID TO YOU BY AEROTEK PURSUANT TO ANY PRIOR EMPLOYMENT AGREEMENT, IN ANY MANNER, WITH THE CLIENT, THE CLIENT'S EMPLOYEES OR ANY CONTRACT EMPLOYEE OF THE CLIENT."

(b) Promulgating, maintaining, or enforcing an oral rule prohibiting employees from discussing wages, hours, benefits, and other terms and conditions of employment among themselves, with other employees or with nonemployees.

(c) Threatening employees by email with discharge if they discuss their wages, hours, and other terms and conditions of employment among themselves, with other employees, or with nonemployees, and referencing the overly broad confidentiality provision in the email.

2. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I shall order them to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondents maintained an overbroad confidentiality provision in its employment agreement, I shall order the Respondents to revise or rescind the provision and to notify its employees, in writing, that it has done so. *Hyundai America Shipping Agency,* 357 NLRB 860 (2011).

Respondent HRUSA contends that notwithstanding their admitted joint employer status with Aerotek it should not be held liable for any violations found with respect to Aerotek's maintenance and/or enforcement of its confidentiality provision.

It is well settled that "[a]s joint employers, each is responsible for the conduct of the other and whatever unlawful practices are engaged in by the one must be deemed to have been committed by both. . . ." *Ref-Chem Co.,* 169 NLRB 376, 380 (1968), enf. denied on other grounds 418 F.2d 127 (5th Cir. 1969). Respondent HRUSA relies on *Capital EMI Music,* 311 NLRB 997 (1993), enfd. mem. 23 F.3d 399 (4th Cir. 1994), as an exception to the foregoing, albeit a narrow one. In *Capital EMI Music*, there was a nonacting joint employer with no daily involvement with the employees, and the alleged violations were premised on antiunion motive. Respondent HRUSA admittedly is an active participant in the employment relationship, and there are no findings of unlawful motive. Respondent HRUSA's counsel suggests that the Board left open the possibility of expanding the holding in *Capital EMI Music.* I believe that had the Board wanted to expand the holding in *Capital EMI Music*, it would have done so at some point during the intervening 18 years. In any case such an expansion is the province of the Board, not that of an administrative law judge.

I reject Respondent HRUSA's argument and I will direct that it and Respondent Aerotek sign the notice as joint employers and that they post the notice in the Germantown and Weccacoe Avenue locations.

I shall also order that Respondent Aerotek sign and mail a separate notice to all current and former employees employed under the employment agreement that has been found to contain the overbroad confidentiality provision. (GC Exh. 2.) In agreement with the counsel for the Acting General Counsel I find that this mailing is necessary because employees working under the agreement work in widely scattered locations for a multitude of clients. *NLS Group,* 352 NLRB 744, 746 (2008), incorporated by reference in 355 NLRB 1154 (2010), enfd. 645 F.3d 475 (1st Cir. 2011). The record is silent regarding a specific date when the overbroad confidentiality provision became part of the employment agreement. Accordingly, I accept the counsel for the Acting General Counsel's suggestion that February 25, 2010, 6 months before the filing of the charge in this case, is an appropriate starting date. Based on the evidence the mailing shall be limited to current and former employees located in Southeastern Pennsylvania. That area encompasses Chester, Delaware, Philadelphia, Montgomery, and Bucks counties. (Tr. 36.) (Cf. id. at 744 fn. 4.) (Respondent stipulated that the contract language was the same or similar for all employees.)

[Recommended Order omitted from publication.]